No. 10,424

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of John Nyhan, Bankrupt,
Appellant,

vs.

DAVID NYHAN,
Appellee.

BRIEF FOR APPELLANT.

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I. JURISDICTION.

This is an appeal by the appellant, John O. England, trustee of the estate of James Nyhan, a bankrupt, from an order of the United States District Court for the Northern District of California, Southern Division, affirming upon review an order of the Honorable Burton J. Wyman, Referee in Bankruptcy (Tr. ff. 49-50) which order sustained the plea of the appellee, David Nyhan, to the summary jurisdiction of the Bankruptcy Court (Tr. ff. 38-41) on appellant trustee's petition (Tr. ff. 32-35) for an order permitting the sale free and clear of any claim of the appellee of a license or permit to operate eight taxicabs on the streets of the City and County of San Francisco.

The District Court had summary jurisdiction of the case under section 2a, subsection 15, of the Bankruptcy Act, as will be discussed hereafter.

The appeal is taken under section 24 of the Bankruptcy Act.

II. STATEMENT OF THE CASE.

A. The appeal.

Appellant's petition alleged that appellee had no interest in the taxicab license or permit above referred to, and held that license as agent and trustee for the bankrupt. (Tr. ff. 33.)

Concisely, the issue is this. At the date the petition for this order was filed, the appellee held the bare certificate evidencing this permit or license. Prior to the date the petition was filed the Police Department of the City and County of San Francisco had not given its necessary consent to the transfer of this license to appellee and on that day, indeed, denied it, so that it remained of record in the name of the bankrupt. On that date the certificate was in the possession of the Police Department.

The Referee determined that appellee had such "possession" of this permit or license as to deprive the bankruptcy court of summary jurisdiction to order its sale and sustained the appellee's plea to the jurisdiction of the court on this sole ground. (Tr. ff. 42 and 30.)

The sole issue, therefore, is whether the appellee had such possession as to deprive the court of the as-

serted summary jurisdiction. Appellant proposes to show that under the facts the learned Referee erred in deciding in the affirmative.

B. The evidence.

James Nyhan, the bankrupt, was the owner of a permit standing in his name, issued by the San Francisco Police Department, authorizing him to operate eight taxicabs. (Tr. f. 20.) Section 1079 of the San Francisco Police Code provides as to the transferability of such permits:

> "All such permits or licenses granted hereunder shall be transferable only on consent of the Police Commission after written application shall have first been made to said commission and upon payment of the fee received of the new applicants." (Tr. f. 12.)*

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*Section 1079 of the San Francisco Police Code (Tr. f. 12) reads as follows:

> "Continuous Operation—Revocation Provided For. All persons, firms, or corporations within the purview of Sections 1075 to 1081 inclusive, of this Article shall regularly and daily operate his or its licensed motor vehicle for hire business during each day of the license year to the extent reasonably necessary to meet the public demand for such motor vehicle for hire service. Upon abandonment of such business for a period of ten (10) consecutive days by an owner or operator, the Police Commission shall, after five (5) days' written notice to the said owner or operator, direct the Police Department of the City and County of San Francisco to revoke said owner's or operator's licenses or permits, and said licenses or permits shall forthwith be revoked. All such permits or licenses granted hereunder shall be transferable only upon the consent of the Police Commission after written application shall have first been made to said Commission and upon payment of the fee required of the new applicants. Any and all such certificates of public necessity and convenience, permits and licenses and all rights herein granted may be rescinded and ordered revoked by the Police Commission for cause."

November 10, 1941, the bankrupt sought to transfer his permit to appellee, his brother. In this behalf he and his brother went to the Police Department where the bankrupt endorsed his name on the back of the permit and filed it with the Police Department while his brother signed and filed his application for the issuance of the license on the transfer to him when the necessary approval of the Police Commission should be given. (Tr. ff. 13-17.)

On November 17, 1941, the involuntary petition in bankruptcy was filed. (Tr. f. 32.) On the same date the Police Commission refused permission to transfer the permit. (Tr. f. 17.) On December 2, 1941, the Board of Permit Appeals of the City and County of San Francisco concurred in that decision. (Tr. f. 17.)

On December 2, 1941, James Nyhan and David Nyhan together went to the Police Department to get the document evidencing the permit. The Department indicated that it would surrender the document only to James Nyhan as he was the one in whose name it stood. James Nyhan signed a receipt, gave it to the police officer at the Bureau of Permits, and the permit was thereupon delivered and received. James Nyhan testified: "I was there, my brother was there, we both received it." (Tr. ff. 17-19.)

After adjudication the trustee, John O. England, obtained an order to show cause (Tr. f. 36) directed to David Nyhan to show cause why the trustee's petition (Tr. ff. 32-36) for an order authorizing the sale of the permits free from any claim of David Nyhan should not be granted. David Nyhan filed his answer

containing a plea to the summary jurisdiction of the Bankruptcy Court and requesting an order quashing service of the order to show cause. (Tr. ff. 38-42.) Upon the hearing the Referee sustained the plea to the jurisdiction and quashed the service of the order to show cause (Tr. ff. 42-43.) Upon review the United States District Judge (Tr. ff. 44 et seq.) affirmed the order of the Referee. (Tr. f. 49.) From these orders and decisions this appeal was taken.

III. SPECIFICATIONS OF ERROR.

The Referee's order and the Order of the District Court affirming the same were and are and each of them is erroneous, contrary to law and not sustained by the facts in that the Bankruptcy Court had summary jurisdiction of the property in question, to-wit, the taxicab license and permit and all rights and privileges incident to said license and permit for the reason that the undisputed evidence shows that said license and permit was at the time the involuntary petition herein was filed, to-wit, November 17, 1941, owned by and in the possession of the bankrupt and that the attempted transfer thereof by the bankrupt to appellee was void and of no effect lacking the consent of the Police Commission of the City and County of San Francisco as required by ordinances of said city and county; and furthermore, for the second and separate reason that the claim to said property made by appellee was and is no adverse claim but merely colorable.

IV. ARGUMENT.

A. THE NATURE AND LIMITS OF SUMMARY JURISDICTION.

By virtue of subsection 15 of Section 2a of the Bankruptcy Act, the Bankruptcy Court has power to "make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

This broad authority, broad enough indeed to cover this case, is restricted only by the provisions of Section 23, which requires plenary as opposed to summary action against "adverse claimants".

We agree with the learned Referee that under *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426, 432, 433, 44 Sup. Ct. 396, 398, 399, 68 L. Ed. 770, 775, summary jurisdiction requires possession, actual or constructive, of the property involved to be in the bankrupt at the time the petition is filed. In defining the necessary possession the court said:

> "The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only".

The *Taubel-Scott-Kitzmiller* case, supra, deals with physical tangible personal property where a definite distinction can be made between actual and constructive possession. In the present case, a license or permit to operate taxicabs for hire in the City and County of San Francisco is the subject matter of litigation. Such license is distinguishable from ordinary personal property in that it is an incorporeal right which is incapable of being physically possessed, so that the inquiry must be directed to the question whether it was constructively possessed by the bankrupt at the time of the filing of the petition in bankruptcy.

The first question to be discussed is, therefore, whether at the time of the filing of the petition the bankrupt had possession of the taxicab license.

Irrespective of possession, the bankruptcy court had summary jurisdiction because appellee's claim is not a substantial adverse claim but merely a colorable claim.

When jurisdiction is the sole issue, on appeal the allegations of the petition or complaint are determinative of the facts. See *Flanders v. Coleman,* 250 U. S. 223, 227; 39 Sup. Ct. 472; 63 L. Ed. 948; 43 A. B. R. 563; and *Matter of 671 Prospect Avenue Holding Corp.* (C. C. A. 2nd) 118 Fed. (2d) 453, 45 Am. B. R. (N. S.) 253, 255, where it was said:

> "It is conceded that the question of jurisdiction must be determined upon the allegations of the petition, which for present purposes are deemed to be true."

B. DID THE BANKRUPT HAVE POSSESSION OF THE TAXICAB LICENSE AT THE TIME OF THE FILING OF THE PETITION IN BANKRUPTCY?

(a) THE TERM 'POSSESSION'' AS APPLIED TO AN INCORPOREAL RIGHT IS A FIGURATIVE EXPRESSION, SINCE INCORPOREAL RIGHTS ARE INCAPABLE OF MANUAL POSSESSION. HOWEVER, THE TERM ''POSSESSION'' HAS BEEN CONSTANTLY APPLIED BY THE COURTS IN CONNECTION WITH THE DETERMINATION OF SUMMARY JURISDICTION OVER INCORPOREAL RIGHTS.

In the case of *In the Matter of Worrall,* 79 Fed. (2d) 88; 29 A. B. R. (N. S.) 604, 607, in connection with summary proceedings concerning a seat on the New York Stock Exchange, the court said:

> ''We have several times adverted to the fact that 'Possession' is a term hardly descriptive of control over a chose in action; yet, though borrowed from the field of tangible property, it has been constantly applied to intangibles. In re Hudson River Nav. Corporation (C. C. A., 2d. Cir.), 20 Am. B. R. (N. S.) 528, 57 F. (2d) 175; In re Borok (C. C. A., 2d. Cir.), 18 Am. B. R. (N. S. 270, 50 F. (2d) 75; and In re Roman (C. C. A., 2d. Cir.), 11 Am. B. R. (N. S.) 354, 23 F. (2d) 556. See, also, In re Kelley (D. C., N. Y.), 2 Am. B. R. (N. S.) 721, 297 F. 676, and In re I. Greenbaum & Sons (D. C., N. Y.), 24 Am. B. R. (N. S.) 301, 6 F. Supp. 245. The decisions are numerous that, if the bankrupt remained the legal owner of the chose in action up to the time of the filing of the petition, though it had become subjected to equitable liens or interests or attachments, his control was such that a trustee in bankruptcy who succeeded him was to be regarded as in 'possession' of the chose in action and as in a position summarily to determine his

rights as against other claimants. Board of Trade of City of Chicago v. Johnson, 264 U. S. 1, 2 Am. B. R. (N. S.) 528, 44 S. Ct. 232, 68 L. Ed. 533; In re Zimmerman (C. C. A., 2d. Cir.), 23 Am. B. R. (N. S.) 570, 66 F. (2d) 397; Street v. Pacific Indemnity Co. (C. C. A., 9th Cir.), 22 Am. B. R. (N. S.) 170, 61 F. (2d) 106, 108; In re Borok (C. C. A., 2d. Cir.), 18 Am. B. R. (N. S.) 270, 50 F. (2d) 75; Seattle Curb Exchange v. Knight (C. C. A., 9th Cir.), 17 Am. B. R. (N. S.) 469, 46 F. (2d) 34; In re Hoey (C. C. A., 2d. Cir.), 1 Am. B. R. (N. S.) 107, 290 F. 116; Orinoco Iron Co. v. Metzel (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 F. 40; In re: Ranford (C. C. A., 6th Cir.), 28 Am. B. R. 78, 194 F. 658; O'Dell v. Boyden (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 F. 731".

Among the decisions cited in the *Worrall* case, are two decisions of this Circuit. In the first of those cases, *Street v. Pacific Indemnity Co.,* 61 Fed. (2d) 106; 22 A. B. R. (N. S.) 170, the question before the court was whether book accounts which the bankrupt had assigned to a third party, were in the constructive possession of the bankruptcy court and subject to its summary jurisdiction. It was held that the assignment of book accounts was not fully completed because the debtors were not notified of the assignment and this left the assignor in the constructive possession of the book accounts at the time of the filing of the petition.

The other case referring to possession of incorporeal rights decided by this circuit, is the case of *Seattle Curb Exchange v. Knight,* 46 Fed. (2d) 34;

17 A. B. R. (N. S.) 469. There, the question was whether the right to the proceeds of a sale of a seat on the Seattle Curb Exchange as between the trustee in bankruptcy and the Seattle Curb Exchange, could be litigated in summary proceedings in the Bankruptcy Court.

The bankrupt had been a member of the Seattle Curb Exchange. Shortly prior to the filing of the voluntary petition in bankruptcy, and for a valuable consideration, he had sold his membership to a certain Phippeny, endorsing his name upon the certificate of membership in said exchange, as well as making a written assignment of his membership to Phippeny. The question was whether in spite of such attempted transfer of the seat, the same came into the custody of the bankruptcy court at the time of the filing of the petition in bankruptcy because the stock exchange had not consented to the transfer prior to bankruptcy. The court held that the seat was in the possession of the bankrupt, and hence had come into the custody of the bankruptcy court at the time of the filing of the petition. In deciding the question, the court cited, with approval, from *O'Dell v. Boyden* (C. C. A., 6th) 150 Fed. 731, 737, 17 A. B. R. 751, as follows:

> "The 'seat' or 'membership' continued to be the 'seat' of Henrotin, and was a pecuniary asset which passed to his trustee. It was as much in his custody and possession as such a species of property is capable of. To deny the trustee's possession would be to deny the capability of possession of a chose in action or other incorporeal right or equity. The possession may be constructive, and not manual; but it is only so because such prop-

erty is not capable of a more tangible custody. Only through a court of equity can the pecuniary value of such an asset be realized to creditors or assignees. Only by decree in personam compelling the bankrupt member can such a transfer of membership be effectuated as will put the buyer in the place of Henrotin as a member. Over him for that purpose the bankrupt court has exclusive control, and in this sense, also, may it be said that the 'seat' or 'membership' was in custodia legis when the trustee sought the aid of the court to adjudicate the claim and liens asserted by O'Dell."

Reference is also made to the case of *Board of Trade v. Johnson,* 264 U. S. 1, 68 L. Ed. 533, 2 A. B. R. (N. S.) 528, which was also a stock exchange case, where the court held that the membership in a stock exchange as an incorporeal right passes to the trustee of the bankrupt, and then recognizes that such right is incapable of manual possession. The court said at page 12:

"The petitioners argue that a seat on the exchange, even if it be property, is incapable of manual possession, that it is really only a chose in action, and that the bankrupt or his trustee is no more in actual possession of it for the purposes of summary jurisdiction than the trustee would be in manual possession of a debt, to enforce the payment of which the trustee must certainly bring a plenary action against the resisting debtor. Membership on the Board of Trade is different from a mere chose in action, like a simple claim or debt asserted against another, and only to be enjoyed after its satisfaction or enforcement. It is a continuously enjoyed 'incor-

poreal right'. Hyde v. Woods, supra. The Board of Trade is the member's trustee, while it maintains and holds all its facilities for his use and enjoyment. As long as he has these, he may properly be said to be in possession of them. That creditor members may assert a mere restraint of alienation to enforce their claims does not oust the member's possession or personal enjoyment. By operation of the bankruptcy law the membership passes, subject to rules of the exchange, to the trustee for his disposition of it. The trustee does not become a member, but he does come into control of the bankrupt's right to dispose of the membership, and with the aid of the bankruptcy court can require the bankrupt to do everything on his part necessary under the rules of the board to exercise this right. The membership is property in a way attached to the person of the bankrupt and disposable only by his will. It follows him, therefore, into the bankruptcy court, which is given full equitable jurisdiction over his conduct in respect of his estate, and therefore comes into the custody of that court to be administered by it as a part of his estate."

In the case of *In the Matter of Irvin Wechsler,* 27 Fed. Supp. 301, 39 A. B. R. (N. S.) 214, the court was concerned with a liquor license which the bankrupt alleged to have assigned prior to the filing of the petition in bankruptcy. The court affirming the summary jurisdiction said:

"In the case of a license with the characteristics of property, there is summary jurisdiction to determine title if the debtor was in possession of the usual rights or privileges covered by the li-

cense when the bankruptcy proceeding was commenced, see Chicago Board of Trade v. Johnson, 264 U. S. 1, 2 Am. B. R. (N. S.) 528, or if an alleged adverse claimant has a title or lien that is only colorable."

See also:

Fisher v. Cushman (C. C. A. 1st), 103 Fed. 860.

From the foregoing authorities, it is clear that possession by the bankrupt of incorporeal property such as a license or permit, has been recognized as the foundation of summary jurisdiction.

We, therefore, will discuss what the courts have held to be possession in the case of such incorporeal rights.

(b) WAS THE BANKRUPT IN "POSSESSION" OF THE INCORPOREAL RIGHT AT THE TIME OF THE FILING OF THE PETITION IN BANKRUPTCY?

Under Section 1079 of the San Francisco Police Code, the consent of the Police Commission is a prerequisite to the transfer of a taxicab license, and the attempted transfer by the bankrupt to the appellee, his brother, was denied on the day of the filing of the petition.

It appears from the above facts that at the time of the filing of the petition no valid transfer of the taxicab license had taken place since the consent of the Police Commission, which is necessary to validate the transfer of a license, had not been obtained.

It follows that whatever dealings had taken place between the bankrupt and the appellee as to the taxi-

cab business, no valid transfer of the license and of the business was made, because under the California law all agreements concerning the transfer of such a license are invalid if made without the approval of the licensing authority and such invalidity affects also transactions concerning the business for the operation of which a license is required.

In *Teachout v. Bogy,* 175 Cal. 481, 485, it was held:

> "A permit of this character is issued in the exercise of the police power as a means of regulating the business of selling intoxicating liquors. Such permit is personal to the licensee, and it authorizes him alone to carry on the business. There was no law authorizing a transfer of the permit. Hence, a transfer of the paper issued as evidence of the permit did not carry to the transferees the right to conduct the business, nor exempt them from the prohibition forbidding any person to engage in the business without a permit. In so doing they would be guilty of a violation of the law to the same extent as if they had no permit. (Black on Intoxicating Liquors, Sec. 130; 23 Cyc. 154; 17 Am. & Eng. Ency. of Law, 232.) The contract was therefore an agreement whereby the defendants were to carry on the saloon business in violation of express law."

See also 16 Cal. Jur. 190 where it is said:

> "Thus a transfer of the paper issued as evidence of the permit to engage in a certain business in a city does not give the transferee the right to conduct the business nor exempt him from the prohibition of the city charter forbidding any person to engage in the business without a permit. Moreover, a contract for the sale of a business

> and of the license issued to the vendor, and for the subsequent carrying on of the business by the vendee without any other license, is an agreement whereby the vendee is to carry on the business in violation of express law. And the vendor's promise to pay a single consideration for the transfer of such a business and license is void. * * *''

Thus, all agreements to the effect that the license was to be transferred to the appellee, are void and invalid under the local law, and the ownership of the incorporeal right remained in the bankrupt.

In the case of incorporeal rights the courts do not distinguish between possession and legal ownership as in the case of personal property. *So long as the legal ownership has not been validly transferred the bankrupt is still in possession of the incorporeal right.*

This was squarely held in the case of *In the Matter of Worrall,* supra, at page 608, where the court expressed the rule as follows:

> "The decisions are numerous that if the bankrupt *remained the legal owner of the chose in action up to the time of the filing of the petition, though it had become subjected to equitable liens or interests or attachments,* his control was such that a trustee in bankruptcy who succeeded him was to be regarded as 'in possession of the chose in action summarily to determine his rights as against other claimants'." (Italics ours.)

In the case of *Matter of Marsters* (C. C. A., 7th) 101 Fed. (2d) 365, 39 A. B. R. (N. S.) 103, the court

answered the question of what is constructive possession in the case of an intangible, as follows:

> "The term 'constructive', as applied to the possession of an intangible, is not used to distinguish such possession from some other kind of possession of an intangible. In the case of a tangible there can be a possession in fact as well as in legal theory; but in the case of an intangible, possession is a legal concept and is manifested only through recognition of legal consequences. It may be said that ownership of intangibles is the subject of possession, or that ownership draws to itself a constructive possession, *but such statements merely afford a rational basis for the practical rule that the legal consequences of possession of a tangible res are attached to the ownership of an intangible res. One of the legal consequences of a bankrupt's possession of a tangible asset is that his trustee succeeds to the possession, and the bankruptcy court thereby acquiring possession, has summary jurisdiction to adjudicate adverse claims respecting the asset.*" (Italics ours.)

In the case of *Hart v. Seacoast Credit Corporation* (Crt. Chan. N. J.) 115 N. J. Eq. 28, 169 A. 648, which case is similar to the instant case in that the sale of a bus franchise was, under the local law, subject to approval by the Board of Public Utility Commission, the court said:

> "That prior to approval by the commissioners the purchaser has no title, legal or equitable, in the franchise, even though he had paid the purchase price and the seller has executed and delivered documents of title. The purchaser has only the right to apply for approval. If and when ap-

proval is granted title then vests without further action of the parties."

See, also, the recent case of *Matter of Lissak,* 110 Fed. (2d) 370, 42 A. B. R. (N. S.) 237, at page 239, where the court, citing *In re Worrall,* supra, said:

> "The bankrupt still remained the legal owner of the chose in action represented by the policy of insurance and, though it had been subjected to equitable liens, he was still to be deemed in such 'possession' of it, that the bankruptcy court might in a summary way determine the respective rights of the bankrupt and adverse claimants."

Hence, notwithstanding the existence of equities in others, the constructive possession continues to be in the bankrupt so long as the bankrupt remains the legal owner of the right in question.

In the instant case the bankrupt, at the time of the filing of the bankruptcy petition, was indisputably the legal owner of the incorporeal right, and therefore he had constructive possession.

(c) THE POSSESSION OF THE CERTIFICATE FOR THE PERMIT IS IMMATERIAL.

The transfer of the license could not be validly made without the consent of the Police Commission of the City and County of San Francisco. Hence a transfer of the paper issued as evidence of the permit did not carry the right to conduct the business.

See:

Teachout v. Bogy, supra, at page 485.

In a case where no consent of a third party or of an administrative body is needed for the transfer of a right or chose in action, the endorsement of a paper, evidencing such right, is considered as symbolic delivery of the right and as the act which makes the transfer of the right effective. However, in the case of a license which can be transferred only upon the consent of an administrative body, such endorsement of the paper evidencing the license and its delivery can be regarded only as an attempt to transfer the right which is void until consent of the licensing authority has been obtained.

This rule follows from the fact that consent is a necessary requirement of the transfer of the license and of the business. It has been aptly expressed in the case of *Hart v. Seacoast Credit Corporation,* supra, where the court held that "prior to approval by the Commissioners the purchaser has no title, legal or equitable, in the franchise even though he has paid the purchase price and the seller has executed and delivered documents of title."

To the same effect is the case of *Seattle Curb Exchange v. Knight,* supra, where this court held that the fact that the bankrupt had endorsed his name upon the certificate of ownership in the curb exchange and also had made a written assignment thereof, did not defeat the summary jurisdiction of the court because the necessary consent to the transfer of the seat had not been obtained prior to the filing of the petition in bankruptcy.

We also desire to refer to the case of *O'Dell v. Boyden,* supra, which was cited with approval by this court in the *Seattle Curb Exchange* case, supra, and by the United States Supreme Court in the *Board of Trade v. Johnson* case, supra.

In the *O'Dell* case the transfer of a seat on the New York Stock Exchange was subject to the consent of the Committee on Admissions of the Exchange, which had not been obtained prior to bankruptcy. The court said, at page 736:

> "But the transfer is not made except by the acceptance of a candidate for membership who is elected in the place and stead of the retiring member. When a 'transfer' of membership is made, according to the terms, which clog such transfers, the transferee becomes a member and the transferor ceases to be one. It follows therefore *that the mere execution of a paper preparatory to transfer or assigning a membership works no change in membership whatever.*" (Italics ours.)

Since the actual possession of the paper evidencing the incorporeal right and the question of endorsement do not affect the constructive possession of the right itself, we believe that there is no need to discuss at length the question of who was the possessor of the paper at the time of the filing of the petition. In fact, at that time the Police Department was in actual possession of the paper evidencing the permit, and was therefore a bailee for the bankrupt until the transfer should be approved. The intention of the

Police Department was to return the paper only to the person in whose name the permit was then standing, i. e., the owner of the permit. The bankrupt was always the owner of the permit, as the application for the transfer of the permit was rejected. The Department, therefore, held the paper as a bailee of the bankrupt at the date of the filing of the petition. However, we do not believe that there is particular need to stress this element of the case since the determination of the question who had possession of the paper does not add anything to the determination of the constructive possession of the incorporeal right, which is the factor upon which the summary jurisdiction of the court depends.

C. DOES APPELLEE MAKE A SUBSTANTIAL ADVERSE CLAIM, OR IS HIS CLAIM MERELY COLORABLE?

Independent of the question of constructive possession, which we have discussed above, the bankruptcy court had summary jurisdiction because appellee's claim is only colorable.

The case of *Taubel-Scott-Kitzmiller Co. v. Fox,* supra, expressly distinguishes between the question of actual and constructive possession, and the further alternative that "the property is held by one who makes a claim but the claim is colorable only."

Following the construction of the statute by the Supreme Court it has been said, in the case of *Matter of Midland United Co.,* 22 Fed. Supp. 751, 36 A. B. R. (N. S.) 914, 921:

> "It is only where the debtor in bankruptcy does not have possession of the property that the question as to whether the claim is colorable arises."

See, also, the recent case of *Bank of California v. McBride* (C. C. A. 9th), 132 Fed. (2d) 769, 52 Am. B. R. (N. S.) 141, 146, where this court said:

> "The court had summary jurisdiction in the premises if, when the bankruptcy petition was filed, the property was actually or constructively in the possession of the bankrupt; or if at that time possession was held by a person who made no adverse claims to the property, or whose adverse claims was determined on inquiry to be merely colorable."

The Referee has quoted (Tr. f. 24) the case of *Matter of Western Rope and Mfg. Co.,* C. C. A. 8, 298 Fed. 926, affirmed on certiorari, *Harrison v. Chamberlin,* 278 U. S. 198; 46 Sup. Ct. 467, 70 L. Ed. 897, where the Circuit Court of Appeals laid down the test for appellant whether the claim is adverse or merely colorable, by stating, at page 927:

> "The application of this rule involves a definition of what is meant by colorable. In our judgment the meaning of that word as used in this connection is that a claim alleged to be adverse is only colorably so when, admitting the facts to be as alleged by the claimant, there is as a matter of law, no adverseness in the claim."

The Supreme Court, in affirming the decision, defined a colorable claim as follows (70 L. Ed. 900):

> "Without entering upon a discussion of various cases in the circuit courts of appeals in which divergent views have been expressed as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy', Board of Education v. Leary, supra, in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense."

See, also, *May v. Henderson,* 268 U. S. 119; 45 Sup. Ct. Rep. 456; 69 L. Ed. 875; *Matter of Weing,* 104 Fed. (2d) 112, 40 A. B. R. (N. S.) 248; *Matter of Meiselman,* 105 Fed. (2d) 995; 40 A. B. R. (N. S.) 792.

Under the above definition of a colorable claim by the United States Supreme Court it is apparent that appellee's claim is merely colorable, because in the absence of the necessary consent by the Police Commission he could not validly acquire any rights to the license which under the San Francisco Police Code is transferable only upon such consent.

We again refer to the California case of *Teachout v. Bogy,* supra, where the California law has been determined to the effect that in the case of a business which is subject to a license, the invalid transfer of

a license affects the validity of all agreements between the parties, which are connected with the transfer of the license, particularly the transfer of the business itself. Thus, appellee, by his agreements with the bankrupt, whatever their nature, could not acquire any valid rights which would interfere with the passing of the license to the trustee in bankruptcy, so that his claim to the taxicab permit is merely colorable and therefore subject to summary jurisdiction irrespective of the question of possession.

CONCLUSION.

We therefore conclude that on either of the theories presented in this brief, the bankruptcy court has summary jurisdiction.

To summarize, the two theories are:

1. That the license, being an incorporeal right, at the time of the filing of the bankruptcy petition was legally owned by and therefore in the possession of the bankrupt.

2. That the claim which appellee makes to the license is merely colorable because the consent of the Police Commission of the City and County of San Francisco, which was a prerequisite to the transfer of the license, was not granted, so that he cannot assert a valid adverse claim to the license.

We therefore submit that the District Court erred in affirming the order of the Referee denying the sum-

mary jurisdiction and quashing the service of the order to show cause, and respectfully submit that this court reverse the judgment of the United States District Court.

Dated, San Francisco,
July 16, 1943.

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